

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NASSAU : TRIAL TERM PART 13

2-----X
3 DIANE T. CLARKE, ILANA KOPMAR, ISAAC ALTMAN,
DAVID ROSENFELD,

4 Plaintiffs,

5 Index No.
618764/2023

6-----
7 -against-

8 THE ASSOCIATION OF LEGAL AID ATTORNEYS,
9 AMALGAMATED LOCAL UNION 2325 OF THE
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO, LISA OHTA, BRET J.
TAYLOR, JEREMY BUNYANER, EMILY C. EATON,
MARTYNA KAZNOWSKI, GILLIAN R. KRESS,
IOANA CALIN, PUJA PAUL,

10-----
11 Defendants.

12-----X
13 November 21, 2023
Mineola, New York

14 B E F O R E:

HON. FELICE J. MURACA, Justice

15 A P P E A R A N C E S:

16 LAW OFFICE OF DAVID A. SMITH, PLLC
17 Attorney for Plaintiffs
500 Old Country Road
18 Garden City, New York 11530
BY: DAVID A. SMITH, ESQ.

19 LEVY RATNER
20 Attorneys for Defendants
80 8th Avenue
21 New York, New York 10011
BY: ALEKSANDR L. FELSTINER, ESQ.
ALLYSON L. BELOVIN, ESQ.

22
23
24 JENNIFER A. SCHMIDT, CSR
25 OFFICIAL COURT REPORTER

Proceedings

2

THE COURT CLERK: Index number 618764 of
2023, Diane T. Clarke, Ilana Kopmar, Isaac Altman,
David Rosenfeld, plaintiffs, against the Association of
Legal Aid Attorneys, Amalgamated Local Union 2325 of
the International Union, United Automobile Aerospace
and Agricultural Implement Workers of America (UAW),
AFL-CIO, Lisa Ohta, Bret J. Taylor, Jeremy Bunyaner,
Emily C. Eaton, Martyna Kaznowski, Gillian R. Kress,
defendants.

Plaintiff's counsel, please rise, give your appearances for the court.

MR. SMITH: Thank you. Good morning, your Honor.

THE COURT: Good morning.

MR. SMITH: David A. Smith, Law Office of David A. Smith, PLLC, 500 Old Country Road, Suite 109, Garden City, New York 11530 on behalf of all four of the plaintiffs, Diane T. Clarke, Ilana Kopmar, Isaac Altman, David Rosenfeld, and three of my four clients, with the exception of David, are also present in the courtroom. To my right, your Honor, my partner, Daniel J. Smith.

MR. J. SMITH: Good morning.

MR. SMITH: And my associate, Joseph M. Purcell.

Proceedings

3

1 MR. PURCELL: Good morning.

2 THE COURT CLERK: Defendant's counsel, please
3 rise and state your appearances for the court.

4 MR. FELSTINER: Good morning. Aleksandr
5 Felstiner of Levy Ratner representing all of the named
6 defendants.

7 THE COURT CLERK: Your address?

8 MR. FELSTINER: 80 8th Avenue, 8th Floor, New
9 York, New York.

10 MS. BELOVIN: Allyson L. Belovin, also with
11 Levy Ratner, same address.

12 THE COURT: Good morning, counsel. Welcome.
13 Welcome all.

14 This court issued a TRO a couple of days ago,
15 and we are here today to hear argument regarding the
16 TRO and whether or not it should be continued.
17 Plaintiff, you go first.

18 MR. SMITH: Thank you, your Honor. Is there
19 an allotted time, your Honor?

20 THE COURT: No allotted time.

21 MR. SMITH: Thank you.

22 THE COURT: If you would like to use the
23 lecturn.

24 MR. SMITH: If I may.

25 THE COURT: You can move it to any location

Proceedings

4

1 you like.

2 MR. SMITH: It's where I feel most
3 comfortable. I am the proprietor of the Law Office of
4 David L. Smith, PLLC, and I and the three attorneys in
5 my office Daniel, Joseph and Ryan Dougherty, who is
6 elsewhere engaged today, are the pro bono attorneys for
7 all four of the plaintiffs in this action. The four
8 plaintiffs in this action in the order listed in the
9 caption are Diane T. Clarke, Ilana Kopmar, Isaac Altman
10 and David Rosenfeld. Each of them is employed full
11 time as an attorney by the Nassau County Legal Aid
12 Society. Each of them is engaged full time in the
13 daily representation of indigent clients in Nassau
14 County primarily in criminal matters but also in
15 specific categories of civil matters that are defined
16 in the charter of the Nassau County Legal Aid Society
17 as being categories in which indigent clients are
18 entitled to free counsel without having to pay any
19 fees. All four of the plaintiffs is a member in good
20 standing of the defendant union.

21 Your Honor, I never had the pleasure of
22 meeting Ilana or Isaac or David until the middle of
23 last week. As to Diane, I am her proud and sometimes
24 awed father-in-law as she is the wife of my son-in-law
25 and partner, Dan Smith. It so happens, Judge, it

js

Proceedings

5

1 shouldn't matter here, but it does, that Ilana, Isaac
2 and David are all practicing Jews. It also so happens
3 that Diane is Catholic and African-American. In the
4 case of each of the four of them, their religious
5 beliefs are an important part of their identity.

6 As for the eight individual defendants in
7 this matter, each of them is identified in the
8 complaint in this action by their respective titles as
9 the eight board members of the defendant union. As
10 such, each of the eight individual defendants bears
11 personal responsibility for the defendant union having
12 adopted a document attached to our complaint in this
13 action as Exhibit A that bears the title, "Resolution
14 Calling for a Ceasefire in Gaza, an End to the Israeli
15 Occupation of Palestine and Support for Workers'
16 Political Speech," and bearing date of November 2023.
17 The parenthetical question that everyone I have spoken
18 to about this case, regardless of their own views or
19 background, is what the heck is a union that supposedly
20 represents each and every Legal Aid lawyer in New York
21 State, who is a member of that union doing opining on
22 any international political event, much less doing so
23 in a manner that is blatantly anti-Semitic.

24 For purposes of brevity as I go on, I am
25 going to refer to this hateful and extremely misguided

Proceedings

6

1 anti-Israeli and anti-Semitic screed that they have
2 published, and that in the event that the court were to
3 lift its restraining order, they would again try to
4 pass and ballyhoo as being a resolution adopted on
5 behalf of all Legal Aid lawyers in New York, including
6 my clients, I'm going to refer to it as the
7 Gaza/Palestine resolution, although I will admit in all
8 candor I'm tempted to refer to it by something more
9 direct.

10 I can tell this court without revealing any
11 client confidences, judge, that each of my four clients
12 were appalled, pained, professionally aggrieved and
13 personally aggrieved when they found out earlier this
14 month that the defendant union, which is charged with
15 the duty, by the way, of representing all four of my
16 clients and every Legal Aid lawyer in New York State
17 who is a member of the union in collective bargaining
18 and other employer interactions with the union employer
19 interactions with the Nassau County Legal Aid Society
20 and the other Legal Aid Societies county by county that
21 their own union, their own union, was hell bent on
22 disseminating its hateful Gaza/Palestine resolution to
23 all of its union members, and that on Friday of last
24 week they were putting it to a one-day vote "yay" or
25 "nay" as becoming an official union position that

js

would, if adopted, be broadly disseminated as being an official position adopted by the defendant union on behalf of all union members. Each of our four professional clients expressed to us one by one their grave and urgent professional and personal concerns about being confronted by their own union, by their own union, with being asked to vote on the Gaza/Palestine resolution. Each of them, I can state without revealing any client confidences, felt and feels that their own reputation in the legal community at large, their reputation before the judge before whom they practice on a day in and day out basis, their reputation in dealing with the Nassau County District Attorneys as District Attorneys with whom they communicate and negotiate on a daily basis on behalf of their clients, and especially their clients themselves, would be seriously and irreparably harmed if the union adopted and disseminated this Gaza/Palestine resolution as having been adopted as an official position by the union of which my clients are all members. Each of them also expressed to us that they felt that their solemn professional obligations to the numerous clients that they are charged with the solemn duty are providing legal representation to on a daily basis regardless of their race, color, creed or religion

1 would be irreparably compromised if the Gaza/Palestine
2 resolution were to be bandied about by the defendant
3 union as being the official position of the union of
4 which they are all members.

5 When my colleagues and I at my law office --
6 this was brand new to us as of last Wednesday, Judge.
7 It's kind of an education. When my colleagues and I in
8 my law office examined and analyzed these concerns of
9 our clients in the legal landscape in which they all
10 practice as attorneys for indigent defendants from day
11 to day, and in which all Legal Aid lawyers in New York
12 State are laboring day to day, including, by the way,
13 six of the eight defendants who are themselves Legal
14 Aid lawyers, they operate in a legal landscape, Judge,
15 where they are inevitably and constantly coming into
16 the intersection of Gideon v. Wainwright and the
17 absolute right to counsel of indigent defendants under
18 the United States Constitution and the Rules of
19 Professional Conduct in New York that apply to each and
20 every attorney in this state when it comes to providing
21 legal representation to a client. More specifically,
22 Judge, in connection with discharging their duties to a
23 broad array of defendants, it is their duty to
24 represent each of them and all of them on a day-to-day
25 basis, how can they, without seeking to identify in the

Proceedings

9

1 holding cell that they enter in every morning, hey, if
2 you are Jewish, stand up because of the resolution that
3 has been adopted by our union I, at a minimum, have to
4 disclose to you that my union has adopted a resolution
5 that calls for the destruction of the State of Israel.

6 Also, Judge, as it relates to the instant
7 proceeding, the adoption of the proposed resolution
8 would deprive plaintiffs of the ability to avoid even
9 the appearance of impropriety and unethical conduct
10 and, again, appearing before judges who are going to be
11 left guessing why they did what they did and are they a
12 part of it, did they vote "yay" or "nay." There is
13 absolutely no basis in law or in their charter for this
14 union to impose upon its members that kind of burden.
15 This union exists for the very purpose of engaging in
16 collective bargaining county by county with the various
17 Legal Aid Societies on behalf of all of their members
18 and also engaging in ongoing negotiations and
19 interactions with each of those Legal Aid Societies in
20 issues other than collective bargaining. It manifestly
21 does not include proposing to adopt a resolution on
22 issues having precisely nothing with the mandate that
23 each of them appear in court on day by day and that
24 each of them are bound by Gideon v. Wainwright do
25 properly and, by the way, Judge, in connection with

js

Proceedings

10

1 each of the county's contracts throughout the state to
2 provide legal services. The additional dilemma that
3 underpins all of this, and that is a very real one, is
4 that each of the County contracts, and it is certainly
5 true in Nassau as we have shown the court in our
6 papers, there is a mission statement that is attached
7 to each and every Legal Aid contract whereby they
8 contract for services to be provided by the various
9 counties. In Nassau County for the year 2023, there
10 are four such contracts totaling almost \$14 million and
11 in each of them it says that the duty of the lawyers
12 and the mission of the Legal Aid Society pursuant to
13 its contract is to provide legal representation to
14 indigent persons who are entitled to that legal
15 representation. It doesn't say anything about taking
16 positions on international affairs that would
17 interfere, actually, with that mandate.

18 Judge, the chimera, the red herring of free
19 speech, free speech, free speech that is bandied about
20 repeatedly by the defendants, including in a press
21 release that was issued within about two hours of your
22 Honor's ruling on Friday that we believe actually
23 violates the restraining order that you issued on
24 Friday, and among other things, talks of the court's
25 unconstitutional conduct in restricting their free

Proceedings

11

1 speech the answer to that is I don't know. There is no
2 free speech issue here whatsoever. What this involves,
3 by the way, and ironically enough in the unsworn -- I'm
4 not sure what the first named individual plaintiff
5 thought. She is an attorney. I am not sure what she
6 thought she was submitting to the court when she last
7 night submitted to the court the only, other than a
8 memo of law, the only papers that were submitted to
9 this court in opposition to our motion is something
10 called a declaration and it was done by Lisa Ohta,
11 O-H-T-A, who identified herself as the president of the
12 defendant union and she is one of the named defendants.

13 THE COURT: Hold on. You don't have the
14 reply affirmation?

15 MR. SMITH: Pardon me, Judge?

16 THE COURT: Do you have the reply
17 affirmation?

18 MR. SMITH: Yes, we do. We e-filed it last
19 night and we served it accordingly. And if I may have
20 the court's permission to do so to hand it up.

21 THE COURT: Not yours. Do you have the
22 defendant's reply?

23 MR. SMITH: No.

24 THE COURT: It was submitted last night at
25 8:40 p.m., is that right?

Proceedings

12

1 MS. BELOVIN: That's correct. You submitted
2 a reply to our opposition.

3 THE COURT: I asked you to submit to me your
4 papers yesterday. They came after the work day was
5 finished. I received them this morning. I have looked
6 through them. The time line -- the time of filing was
7 6:45 p.m. yesterday. Did you receive it?

8 MR. SMITH: We did, Judge. We replied at
9 around 8:30 last night.

10 THE COURT: I have your reply. Do you have
11 his reply?

12 MS. BELOVIN: Yes.

13 MR. FELSTINER: Yes.

14 THE COURT: Go ahead.

15 MR. SMITH: Judge, the document that was
16 submitted to this court as the only factual submission
17 in opposition to the instant motion was this thing
18 called a declaration signed by the union president Lisa
19 Ohta, who is herself an attorney, according to the
20 responding papers, six out of the eight individual
21 defendants. The other two defendants have other rules,
22 a paralegal and an office manager of some sort, but six
23 of them are lawyers. Every one of those lawyers knows
24 how to swear to something under CPLR 2106 in order to
25 properly submit it to the court. Every one of those

1 lawyers knows that if they do so and if they lie in it
2 or if they take any position that is contumacious or
3 otherwise frivolous that under Uniform Rules of the
4 Court 130-1.1, they are answerable in the form of
5 sanctions. All I can think of as a basis for this
6 otherwise incomprehensible declaration having been
7 issued to the court, rather than a sworn statement by
8 anyone, is that they were trying to avoid those
9 sanctions. But what I do know fundamentally is that
10 they are in default. They are in default of having
11 summoned by midnight yesterday, the 20th of
12 November 2023, with some sort of factual submission to
13 this court upon which this court can rely because it
14 was properly sworn to and submitted, and they didn't do
15 it. Even the changes that are imminent in CPLR 2106
16 that go into effect January 1 of 2024 that are going to
17 codify that any person, not just a lawyer or a doctor,
18 any person now as of January 1, 2024 is going to be
19 able to say that they submit this under the penalty of
20 perjury pursuant to 2106. That statement is not in
21 this so-called declaration, and I can't imagine that
22 that is, and I can't imagine that that is inadvertent.

23 Your Honor, in the event that the court were
24 to deny the continuance of the restraining order that's
25 already in place pending the full hearing and

1 determination of this action or at least pending such
2 interim further order of this court as the court may
3 issue, I have already made, I think, abundantly clear
4 the irreparable harm that will be suffered by not only
5 my four plaintiffs, but Legal Aid lawyers throughout
6 the state. Ironically enough, including six of the
7 eight defendants.

8 In terms of the balancing of the equities,
9 you know, Judge, it's almost funny if it were not at
10 all funny that what we're talking about is a union
11 representing Legal Aid attorneys in New York who are
12 arguing vociferously that they have some sort of right
13 as a union representing my clients to take a position
14 on Israel, Gaza and Palestine that will absolutely
15 truncate the ability of these attorneys to do their
16 jobs on behalf of a whole category of their -- of the
17 people that they are charged with representing. It
18 also is literally and existential crisis to the various
19 Legal Aid Societies throughout the state. County
20 Executive Blakeman in Nassau County wrote a very, very
21 direct response to the Gaza/Palestine resolution and
22 sent it to the union president just a week ago that
23 made this abundantly clear insofar as Nassau County is
24 concerned. The County and every one of the counties
25 that provide the bulk of the funding for Legal Aid

1 throughout the state at the drop of a hat could cancel
2 their contracts if they felt that the unions were
3 acting in a manner that is inconsistent with their
4 duties. The provisions of the Code of Professional
5 Conduct, Judge, that are in play here and that we have
6 cited in our papers are -- I don't see any particular
7 reason to repeat them here, but what they have to do
8 with fundamentally is that a client has a right to have
9 an attorney whose own interests are in no manner
10 inconsistent with or contrary to the interests of the
11 client unless that will conflict is revealed to the
12 client in advance of the representation and the client
13 waives the conflict.

14 So I ask again, Judge, and I ask it, by the
15 way, and I don't know if they are in the courtroom, but
16 I hope they are, the six defendants who are themselves
17 Legal Aid lawyers how exactly, how exactly do you
18 propose in the future to do your job as a Gideon v.
19 Wainwright lawyer assigned to represent indigent
20 clients wherever you practice, without first disclosing
21 to them, if this screed is adopted, that it has been
22 adopted and that if you felt the need to have everybody
23 who is Jewish or otherwise offended by it identify
24 themselves. And, Judge, to be absolutely clear it
25 couldn't matter less, it couldn't matter less, whether

Proceedings

16

1 the position espoused was 100 percent pro Hamas or
2 100 percent pro Israel or, for that matter, had
3 something to do with even pro or con Nazis. You can't
4 do that as a Legal Aid lawyer. When you come to this
5 intersection in which all of these lawyers practice
6 between Gideon v. Wainwright and your ethical duties to
7 these clients, you can't do it. There is no free
8 speech issue here, Judge.

9 I state to you, as I approach my closing
10 comments here, and this declaration that the president
11 of this union filed with this court includes a
12 statement that, hey, you know what, if they are
13 aggrieved any one of the plaintiffs can go out and talk
14 to whomever they want to talk about and exercise their
15 right of free speech. So can the defendants. What the
16 defendants can do, Judge, they can walk out of this
17 courtroom today locking their arms and goose step out
18 to the parking lot and hold up a megaphone and shout
19 their hateful venom about Israel and about Jews. They
20 have that right. What they don't have the right to do
21 as they do so is to chain themselves to my clients and
22 to every other right thinking Legal Aid lawyer who
23 knows that these kinds of positions, regardless of who
24 they are in favor of and who they are against, cannot
25 be taken by a Legal Aid Society that is charged with

1 the duty of representing lawyers throughout the state
2 who themselves are charged with the solemn duty of
3 representing all manner of clients under Gideon v.
4 Wainwright regardless of race, color, creed or
5 religion.

6 In closing, Judge, on the other side, I can't
7 even conjure what I'm going to hear because it sure is
8 not in their papers what's the irreparable harm that
9 could possibly be suffered by a union representing this
10 group of people if they are stopped from adopting a
11 Gaza/Palestine resolution. What are the balancing of
12 the equities in their favor by which this court
13 respectfully could possibly rule that the equities are
14 in their favor and not on the other side? Where is
15 their likelihood of success on the merits? Judge, we
16 have two very carefully crafted causes of action in the
17 underlying action, none of which have been addressed in
18 any of the papers that were submitted to the court by
19 the defendant's counsel and by the president of the
20 union, and that is the duty of fair representation to
21 the union members and breach of contract.

22 Again, Judge, I am all ears waiting to hear
23 how any of what they are proposing to do here is in any
24 way consistent with those duties because I know that
25 what they are proposing to do here is fundamentally not

Proceedings

18

1 and the harm that will be transacted upon each of my
2 defendants, each of my plaintiffs, pardon me, and of
3 all other persons similarly situated to them who are
4 Legal Aid lawyers, is profound and probably
5 irreversible in the event that they are allowed to go
6 ahead with their plan to issue this screed.

7 I thank you, your Honor.

8 THE COURT: Thank you. Defense. You can
9 take the lectern as well. No time limit.

10 MR. FELSTINER: Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. FELSTINER: I would like to state at the
13 outset, and I think statements of plaintiff's counsel
14 demonstrate this is a very complex issue with deep
15 feelings on the different sides. Defendant union,
16 known as the ALAA, is attempting to deal with it
17 through internal Democratic processes contrary to the
18 plaintiff's assertion. Neither the union, nor the
19 individual defendants have, quote/unquote, adopted this
20 document. The process is still ongoing. We submit
21 that the court should allow that process to continue
22 without judicial intervention. That is the proper and
23 appropriate method for a private organization to
24 determine through a body, through a vote of its
25 membership body what position it chooses to take on

Proceedings

19

1 this issue of public concern.

2 You will note that plaintiffs do not seem to
3 contend that the union or the individual defendants
4 disobeyed or short-circuited any of the bylaws in
5 bringing this matter to a vote, and that's because the
6 union, in fact, did follow its internal procedures.
7 And that question of what the union did in responding
8 to a request from the membership and the elected
9 delegates of the union to speak on this issue goes
10 directly to the underlying causes of action in this
11 case, which are the duty of fair representation and the
12 breach of contract. And I will speak about those in
13 due course. They received virtually no attention in
14 plaintiff's oral argument today and that's because
15 there's absolutely no claim on either.

16 But I'm going to start with the
17 constitutional question because of the absurdly short
18 shrift that plaintiff's counsel gave to the free speech
19 rights of the defendant union and its members.
20 Defendant submits that extending this temporary
21 restraining order would be unconstitutional. I will
22 start by noting under the bylaws of this organization
23 the members have the highest authority in their union.
24 Their authority exceeds the authority of the officers
25 or any of the elected delegates and they are entitled

1 to use that authority to express statements on issues
2 of public concern. Plaintiffs may not wish the union
3 to make these statements, but the union and its members
4 are entitled to make these statements, if they so
5 choose. You will see in the bylaws, in fact, that the
6 union's mission statement is not limited to bargaining
7 contracts and negotiating grievances, that the union is
8 empowered under its bylaws to address the welfare of
9 the members to address the political and cultural
10 beliefs of the members and to represent them in the
11 public's sphere. In this case, members drafted a
12 statement on a matter of public concern, presented it
13 to the union leadership through their elected
14 delegates. The union did not disregard it, but gave it
15 a due hearing at a meeting of the Joint Council in
16 which all of the elected delegates had a duty to
17 participate and all the membership had an opportunity
18 to participate because it was an open meeting. After
19 debate, the Joint Council voted to put the issue before
20 the full membership. All of this was consistent with
21 the union's constitution and bylaws. And I mention
22 that because that is actually the issue in the
23 underlying causes of action, not the content of the
24 resolution, but whether the union carried out its duty
25 of fair representation to the members, however, I will

1 speak on the constitutionality of the requested
2 restriction because this case shouldn't go any further
3 than that.

4 Each member has a right to express their
5 views by voting. The union itself has a right to
6 express its views on this public concern issue.
7 Supreme Court has made clear that nonpersons have free
8 speech rights equivalent to persons, at least on these
9 type of issue. And voting, as well as publishing a
10 resolution like this, is an expressive act. You are
11 taking a position for or against the statement that has
12 been drafted by one of the chapters. So what
13 plaintiffs are asking this court to do is a classic
14 example of prior restraint, asking the court to
15 restrain the members from voting and to restrain the
16 union from expressing its position. Prior restraint is
17 reserved for things like national security. Members
18 are not voting on whether the Pentagon papers should be
19 released. They are voting to take a statement on an
20 issue of public concern that is extremely critical and
21 important, presumably to the plaintiffs, certainly to
22 the members of the union that presented this resolution
23 and argued about it and ultimately voted to present it
24 to the membership.

25 I also will point out that plaintiffs are not

1 asking the court to enjoin the vote or suppress the
2 resolution because of the topic. They are asking the
3 court to suppress the resolution because of the
4 viewpoint expressed. This is viewpoint discrimination.
5 It has been identified as the most egregious form of
6 content based restriction on speech. It targets a
7 specific viewpoint for suppression and says because of
8 what this resolution says it cannot be published.
9 People cannot vote on it. Now, plaintiff's made a big
10 deal out of the fact that defendants -- individual
11 defendants or lawyers, individual plaintiffs are
12 lawyers as well. Probably that entire group is aware
13 that content based restrictions on speech must survive
14 strict scrutiny, which means it has to be necessary to
15 achieve a compelling government interest. And if you
16 are going to go after speech like that it also has to
17 be narrowly tailored to accomplish that interest. None
18 of those elements are present here. And neither I nor
19 the defendants mean to question the sincerity of
20 plaintiff's personal grievance that they felt
21 aggrieved, that they were concerned about the
22 imputation of prejudice, that they were concerned about
23 harm to their reputation. All of those things may be
24 true. Those are not compelling government interests.
25 They simply are not. There is a single government

1 interest that has been identified, which is the
2 provision of defense to indigent defendants. That is a
3 government interest. I would suspect that both
4 plaintiffs and defendants and the membership of the
5 union share the belief that that is an important
6 government interest. However, this injunction is not
7 necessary to protect that interest and that is the
8 standard. It's not tailored to protect that interest.
9 It is very dubiously related to that interest. The
10 nightmare scenario that plaintiffs presented to you of
11 a defendant -- a defense attorney going into a holding
12 cell and having to identify, I suppose, all of the
13 defendants in the cell that are Jewish or might take
14 offense to the resolution and then disclose that they
15 are members of a union that made the statement, it's
16 speculative and does not in any way relate to the
17 court's responsibility in this case. Unless plaintiffs
18 themselves hold a belief that would interfere with
19 their ability to provide competent and loyal
20 representation, this potential conflict that plaintiffs
21 are talking about does not exist. And the appearance
22 of conflict depends on this client or this judge or
23 this, I guess, professional colleague imputing a
24 statement from this Democratic organization onto every
25 one of its members. That is not how Democratic

Proceedings

24

1 organizations work. If that is how they worked, then
2 plaintiffs would have to give a disclosure about every
3 statement made by every organization they belong to and
4 so would every other lawyer who practices in this area.
5 That is simply not the responsibility of an attorney
6 when attempting to provide conflict free
7 representation. The responsibility is to identify if
8 there is anything either apparent or real that would
9 create a conflict with their ability to provide
10 competent loyal representation. That is not the case
11 here. So what you end up with are personal grievances,
12 reputational harms, concern about being imputed as
13 prejudice based on the fact that a union made a
14 statement and you as an attorney are represented by
15 that union. That is not a compelling government
16 interest. And as I will get to when I discuss the TRO
17 factors, it is also not an irreparable or immediate
18 harm.

19 I would like to move to the merits of the
20 case. Although we believe that the court is foreclosed
21 from issuing this injunction based on the First
22 Amendment rights of the union and its members, I will
23 address the merits since I believe that the court
24 deserves to hear a little bit about the causes of
25 action that the plaintiffs bring here.

1 They bring, first, duty of fair
2 representation. Second, a breach of contract. Here is
3 the problem with the duty of fair representation claim.
4 There is no conduct alleged that could establish a
5 breach of this duty. And I would ask the court to
6 think about what is this duty. It's a fiduciary duty
7 that the union provides to its members. When you claim
8 a breach of a duty, you need to identify what is the
9 duty that defendants owed to the plaintiffs and the
10 rest of the membership? What is that duty? Under the
11 plaintiff's conception, did the defendants have a duty
12 to disobey their own union bylaws? So there is a
13 properly submitted request for a resolution to come
14 before the membership. According to the plaintiffs, I
15 suppose, the defendant's duty here was to disregard
16 that request. Were defendants supposed to exclude
17 delegates from presenting the resolution to prevent
18 them from arguing over it, to prevent them from putting
19 it to a vote? And once they had put it to a vote, were
20 defendants expected under plaintiff's conception of
21 this duty, to nullify that vote, disregard it, not send
22 it to the membership? If you want to talk about a
23 breach of the duty of fair representation, that would
24 be one. Were the defendants supposed to tell the
25 members, listen, your elected delegates want you to

Proceedings

26

1 vote on this and they followed the proper procedures
2 and it was approved by the Joint Council, but we are
3 just not going to let you do it. That is apparently
4 the duty that they were expecting defendants to carry
5 out. It's completely contrary to the defendant's
6 obligations as officers of the union. I speak here on
7 behalf of the individual defendants. In terms of the
8 union's responsibility, the union's responsibility is
9 to follow the bylaws and the highest responsibility in
10 the union is the members.

11 Now, in terms of the components of a duty of
12 fair representation claim, here is the way you can do
13 it. You can argue that the union acted in bad faith.
14 You can argue that the union acted arbitrarily or you
15 can argue that the union acted discriminatorily. Those
16 are the options. None of them are met. There is no
17 indication or even allegation of bad faith. There is
18 no suggestion that any of the individual defendants
19 misrepresented anything or concealed anything. Their
20 conduct wasn't arbitrary. In fact, it was the
21 opposite. Arbitrary conduct might be to throw this
22 resolution out there without seeing whether anybody was
23 interested in it. Arbitrary conduct would be to
24 disregard the vote and decide we are not going to put
25 this to the membership even though the elected

1 delegates ordered us to do so. Union followed its rule
2 respective to voting of their elected delegates and
3 placed the issue before the membership. That is not
4 arbitrary.

5 Finally, discriminatory. Discriminatory
6 conduct requires that plaintiffs be deprived of their
7 membership rights in some way or suffer an adverse
8 impact on under the terms and conditions of work.
9 There has to be some kind of loss or injury. Simply
10 disliking the statements or beliefs of a union is not
11 discrimination. Disagreeing is not discrimination. A
12 union is not required to account for and represent the
13 personal beliefs of every single member. They are
14 required to treat them fairly and equally and that is
15 what happened. Plaintiffs had an opportunity to
16 participate in this debate. Plaintiffs had an
17 opportunity to vote.

18 Finally, to make out a DFR claim, duty of
19 fair representation, pardon me, I refer to it
20 colloquially as a DFR, there has to be an injury or
21 loss. In other words, even if you could show that
22 something happened that was in bad faith or arbitrary
23 or discriminatory, there still has to be an injury or a
24 loss. It cannot be speculative. It cannot be the
25 possibility of reputational harm. It cannot be the

Proceedings

28

1 personal grievance felt when your union takes a
2 position that you disagree with. Perhaps that offends
3 you. Maybe I am unselling it. If the union takes a
4 position that offends you personally and deeply, that
5 is still not an injury or a loss that is cognizable
6 under Federal Labor Law. It's a breach of the union's
7 fiduciary duties. Because the duty does not include
8 making sure that everybody is not offended.

9 As to the contract claim as we explained in
10 our papers, it's foreclosed on a number of grounds.
11 First, it's preemptive.

12 THE COURT: I want you to address his claim
13 that CPLR 2106 hasn't been complied with.

14 MR. FELSTINER: Certainly. I will say, in
15 the first instance, that our defendant, Lisa Ohta -- I
16 assume you are referring to the declaration that was
17 submitted?

18 THE COURT: No. He is saying your papers
19 were improperly submitted. They weren't sworn to, and
20 that the only document that was addressing the issue
21 was an unsworn document, is that right?

22 MR. SMITH: Yes, your Honor.

23 MR. FELSTINER: I will say on behalf of
24 defendants our understanding was that we were in
25 compliance because the declarant is, indeed, a licensed

1 attorney and would be permitted to issue declaration.
2 If there was a procedural error there, it was
3 inadvertent. Unfortunately, I would need to review
4 that section of the CPLR in order to ensure that we
5 were complying in order to rectify any issue, but I
6 will say that the memorandum of law addresses our
7 arguments and can be applied to the factual material
8 that was submitted by the plaintiffs.

9 THE COURT: Okay. You can continue.

10 MR. FELSTINER: Thank you. In terms of the
11 breach of contract, it's preemptive by Federal Labor
12 Law. What defendants are claiming here is that there
13 is a contract created by the bylaws and that the union
14 and the individual -- sorry, plaintiffs are claiming
15 here. There is a contract created and that the
16 individual defendants and/or the union breached that
17 contract in some way.

18 Let's assume for the moment that the union's
19 bylaws do create an enforceable contract. The claim is
20 a challenge to the union's representation. Did the
21 union represent people? According to the bylaws, that
22 is the exact same claim as did the union breach its
23 duty of fair representation. And for that reason, the
24 courts will preempt claims of this type. It has
25 happened. It should happen here. You have a Federal

1 and State scheme dealing with the exact same conduct
2 under the supremacy clause Federal Labor Law that
3 defines the union's duty must prevail. Union cannot be
4 attempting to comply with the federal duty and then be
5 subject to liability for breach of contract when it's
6 the exact same representational conduct. This claim is
7 also foreclosed by the General Association Law Section
8 13 and the well-known New York Court of Appeals case
9 Martin v. Curran in for any state law claims of this
10 type against an unincorporated association, the
11 plaintiffs must allege authorization ratifications by
12 every member. They haven't done so here. They can't
13 do that here, so the claim is foreclosed.

14 Finally, if the plaintiffs could get around
15 both of those, you have a problem with the basic
16 elements of a breach of contract. You have to identify
17 an enforceable promise. The aspirational language in
18 the union's bylaws that says that the union will
19 attempt to secure the reputation -- excuse me, the
20 ability of members to provide high quality legal
21 services, that's not an enforceable promise. What you
22 need is an enforceable promise to, I suppose, nullify a
23 vote, to prevent a resolution like this from being sent
24 to the membership. That is the promise that they are
25 claiming that the union made somehow in this

1 constitution. It is not there. You don't have
2 enforceable promise in a breach of contract claim. You
3 don't have certain damages and other requirement for a
4 breach of contract claim. You have speculative
5 reputational harm, speculative conflict in the
6 provision of indigent defense. You have personal
7 grievance. That's not a contract claim.

8 So under the TRO factors, the first one,
9 perhaps the most important in this case, is the
10 plaintiffs have no possibility of succeeding on the
11 merits, cannot extend a TRO. The plaintiffs have no
12 possibility of proving a breach of the duty of a fair
13 representation or a breach of contract.

14 Second factor is the harm. And I want to
15 make clear in addressing this that the defendants do
16 not intend to minimize any of the feelings that
17 plaintiffs may have felt in response to reading this
18 resolution. The problem is that the cognizable harms
19 are speculative, not the personal dignitary harms.
20 They may have been immediate and they are subjective,
21 but the cognizable harms that the court could remedy
22 are far too speculative and attenuated to justify this
23 kind of injunctive relief. What plaintiffs are saying
24 is that unrelated third parties will have a injurious
25 reaction. Judges will wonder about the allegiance of a

Proceedings

32

1 particular attorney based on the fact that their union
2 made a statement. That's not imminent harm. It's not
3 immediate. It's speculative. It's not saying that any
4 of those things is impossible in every case. What I am
5 saying is that the harm has to be immediate.

6 Plaintiffs are, essentially, asking the court to take
7 judicial notice of this supposed backlash as if it's a
8 scientific fact or a law of physics. That's not the
9 standard that the court is obligated to apply when
10 issuing injunctive relief, let alone prior restraint of
11 free speech. It can't be based on anecdotes. It can't
12 be based on specter.

13 THE COURT: Will it create a conflict for
14 Legal Aid attorneys?

15 MR. FELSTINER: Not if they don't have
16 personal conflict. If a Legal Aid attorney is able to
17 provide competent and loyal representation, then
18 issuance of a statement by their outline creates no
19 conflict.

20 THE COURT: Plaintiff says that the Legal Aid
21 attorneys will have an obligation to disclose the
22 contents and the possible conflict.

23 MR. FELSTINER: Defendants disagree.

24 THE COURT: Why?

25 MR. FELSTINER: Because there is -- let's

1 take it actual versus apparent. If there is no actual
2 conflict, then there is no duty to disclose any issue
3 that plaintiff or any other Legal Aid attorney would
4 have. The problem, I believe, that they are invoking
5 is an apparent conflict. The idea is an organization
6 makes a statement and then the contents of that
7 statement is automatically imputed to every single
8 member. That is the idea. However, it's a Democratic
9 organization. There is no reason, and I could find no
10 basis in the Professional Ethics Rules, that an
11 attorney is required to disclose the statements of
12 every single organization to which they belong on the
13 possibility that those statements might create the
14 appearance of a conflict prior to representing a
15 client. I would also add this is a democratic
16 organization. Democratic organizations are going to
17 take positions and individual members will disagree
18 with them on occasions.

19 THE COURT: I like to ask questions. Don't
20 think because I ask one side more questions, one side
21 less, I want as much information as I can get today.

22 MR. FELSTINER: Understood, your Honor.

23 THE COURT: From your arguments, your papers
24 I have to go through very carefully, but I want to
25 flush this out so I know what issues to look at.

Proceedings

34

1 MR. FELSTINER: Thank you, your Honor. I
2 just had one further point to make and then I will
3 conclude, if that's all right.

4 THE COURT: By the way, has this
5 organization, this union, ever issued any sort of
6 resolution on any issue?

7 MR. FELSTINER: I am not prepared to specify
8 ones. The answer to that question, in general, is yes.

9 THE COURT: On what issue?

10 MR. FELSTINER: I am afraid I can't speak to
11 specifics.

12 THE COURT: Outside the function of the, what
13 I would say, the general duties of the union, which is
14 collective bargaining.

15 MR. FELSTINER: I don't know the answer to
16 that, your Honor.

17 THE COURT: Okay.

18 MR. FELSTINER: It is something that if it
19 were relevant to the inquiry, we would be prepared to
20 brief that question and present additional evidence.

21 THE COURT: Is this case different than
22 others in dealing with free speech because we are
23 dealing with attorneys who owe a duty to clients, have
24 professional responsibilities, I think DR9 would apply
25 to this. Did you preview those sections?

1 MR. FELSTINER: Briefly, I think, I could
2 say.

3 THE COURT: I just wonder, and I'm going to
4 examine how that interplays with the arguments being
5 made by both sides today. And you can address it, if
6 you would like.

7 MR. FELSTINER: Well, I think for the moment
8 here I will simply say that the State has, and this is
9 a point that was made in our brief, the State has
10 already taken certain measures to ensure that
11 plaintiffs and other Legal Aid attorneys are providing
12 conflict free and competent and loyal representation,
13 including the rules of professional conduct that we
14 certainly would endorse any plaintiff, as well as any
15 of the defendants and any of the members. The
16 statement of the union doesn't fall into any category
17 that requires a disclosure or that will interfere with
18 the, generally speaking, with the Legal Aid attorney's
19 ability to provide conflict free representation. The
20 reason I say generally speaking is because individual
21 attorneys do have a duty to, pardon the language, look
22 inside themselves and determine if they have a
23 conflict. In other words, if they have a conflict
24 independent of the appearance of conflict, they are
25 obligated to disclose that. If for some reason the

1 issuance of this resolution prevented plaintiffs from
2 representing somebody competently and loyally, I
3 suppose they would have a duty to disclose that. I
4 would also note that this is a voluntary organization.
5 Plaintiffs are free to resign membership. Plaintiffs
6 are certainly free to oppose the resolution and
7 communicate their opposition to the resolution and from
8 our perspective that would certainly take care of any
9 personal responsibility they have to ensure that
10 clients don't exceed the appearance of a conflict.

11 THE COURT: Okay.

12 MR. FELSTINER: The last point I just wanted
13 to address, because it's the very prong in the TRO
14 factor, is the balance of the equities, and this was
15 addressed by plaintiff's counsel. I think I will start
16 by saying it seems clear from plaintiff's counsel and
17 defendants have no reason to doubt that plaintiff's
18 experience deep discomfort associated with this
19 statement. They may feel deep discomfort being
20 associated with the union if the union ultimately votes
21 to support or publishes this statement. I believe that
22 is what sits on their side of the scale. On the other
23 side is the protected speech and rights of the rest of
24 the members and, in fact, the plaintiffs as well to
25 vote on this resolution and the union to take this

1 position. Those are not minimal, despite having been
2 minimized by plaintiff's counsel, they are enshrined in
3 the Bill of Rights. If a vote occurs and the resolution
4 is approved, as I said, plaintiffs can resign from
5 union membership, they can publicly oppose the union's
6 position. That right is guaranteed in the
7 international union constitution. If the court enjoins
8 this vote, the members can't vote. As a body on the
9 issue, they cannot express their collective position.
10 This is the nature of Democratic organizations;
11 sometimes people disagree. But the balance of the
12 equities can't prevent freedom of speech. With that, I
13 will conclude.

14 THE COURT: By the way, before you end, what
15 number paragraph or section of the constitutional
16 bylaws do you believe gives this union the right to
17 hold this vote? Do you have a specific section? I
18 read the constitution and the bylaws already.

19 MR. FELSTINER: It's the section that gives,
20 and I believe it's in Article 4, the members of the
21 highest authority in the union. Once the membership
22 presents the matter for consideration by the Joint
23 Council, the Joint Council is obligated to consider it.
24 If the Joint Council votes that the resolution should
25 be placed before the full membership, that must be

1 done. So there isn't a specific section of the
2 constitution that says the union is permitted or
3 precluded from speaking on this issue or that issue.
4 There is language in the mission statement that speaks
5 to the general purpose of the union and that is
6 certainly encompassed by making statements of the type
7 that the resolution of the type contained in the
8 resolution. I also point out the resolution does not
9 only address the violent conflict in Gaza and
10 Palestine. It also addresses the union's solidarity
11 with other unions and other members that are
12 experiencing retaliation as a result of political
13 speech. It pledges to organize in solidarity with
14 those members. This is pretty classic collective
15 action that members are entitled to engage in. We
16 don't focus on the content of resolution of this
17 purpose, and to the extent the court inquires into
18 that, it should be understood that it is not simply a
19 comment on what is happening across the ocean. It's
20 also a comment on what is happening right here in New
21 York State with respect to the political speech of
22 members.

23 THE COURT: Plaintiff.

24 MR. SMITH: May I, your Honor?

25 THE COURT: Counsel for the defense claims --

1 MR. SMITH: Your Honor, we have addressed --

2 THE COURT: Hold on. I have some questions
3 for you. Counsel set forth an argument.

4 MR. SMITH: Pardon me, Judge.

5 THE COURT: Counsel has argued --

6 MR. SMITH: Yes.

7 THE COURT: -- that free speech allows the
8 union to issue this resolution. What say you?

9 MR. SMITH: What we say, Judge, is that there
10 is no defendant in this case, no other member of the
11 union who can't, on their own time, 16 hours a day,
12 Monday through Friday when they are not working, and 24
13 hours a day on Saturday and Sunday when they are not
14 working, and go out and espouse whatever fowl orthodoxy
15 they want to espouse. What they cannot do in the name
16 of so-called free speech is to attempt to impose upon
17 their union members as a whole a method of speech that
18 is expressly violative of precisely of what this union
19 exists to do in the first place. By the way, Judge, we
20 did put together last night reply papers and at
21 paragraph 18 of our reply papers we cite from the
22 defendant's own constitution, the UAW constitution at
23 Article 19, quote, "No officer, member, representative
24 or agent of the international union or of any local
25 union, in this case the ALAA, or of any subordinate

Proceedings

40

1 body of the international union, shall have the power
2 or authority to counsel, cause, initiate, participate
3 in or ratify any action which constitutes a breach of
4 any contract entered into by a local union or by the
5 international union or a subordinate body thereof",
6 closed quote. Everything that each of these Legal Aid
7 lawyers do, including the six of the defendants who are
8 themselves Legal Aid lawyers, is done under the
9 auspices of a local contract between the various Legal
10 Aid Societies, in this case Nassau County. And, by the
11 way, we have the Chief Attorney of Nassau Legal Aid,
12 Scott Banks, here today. It is a contractual duty of
13 each of them to carry out their solemn duties under
14 Gideon v. Wainwright. And, Judge, you know, it's
15 patently offensive to characterize these fervent
16 objections that my feelings have as feelings and
17 inchoate. There is nothing inchoate and nothing that
18 are feelings about this. These are the obligations
19 that these Legal Aid lawyers, including the six
20 defendants who are Legal Aid lawyers, have to these
21 people each and every day.

22 In terms of the free speech, Judge, what was
23 incumbent, if I may, upon this union, immediately upon
24 allegedly being approached by union members that they
25 have this concern about Gaza and Palestine, go down the

1 block. This ain't our issue. This union has no
2 business becoming involved in this in the first place.
3 When the union undertakes to do so, it cannot sit here
4 and ring its hands before the Court and say, oh, woe is
5 me. We find ourselves in this dilemma because our
6 union members wanted to vote on this. Nonsense. You
7 tell them it's not our issue. You tell them our
8 constitution does not allow it. You tell them we are
9 not auto workers here. Even though we are part of the
10 United Auto Workers Union, we are all lawyers. Go look
11 at the Rules of Professional Conduct and you will see
12 why this union cannot take a position on this in the
13 name of free speech. Judge, in terms of this screed, I
14 will now call it, because that is what it is, it is
15 full of thin legal, very thin legal arguments for the
16 absolute destruction of the State of Israel. This is
17 not some speculative worry on my client's part that
18 this resolution, if allowed to go to a vote and
19 adopted, is going to create for them a conflict with
20 their clients. Nothing is speculative about that. And
21 the Rules of Professional Conduct counsel may seek to
22 belittle this, but the Rules of Professional Conduct
23 will require each and every Legal Aid attorney,
24 including these six defendants, to disclose to any
25 potential client in advance of their representation.

1 What's going on here? Everyone in this holding pen who
2 is Jewish, please raise your hand. That is what they
3 are going to have to do. That is the position that
4 this union has put them in and it's an absolutely ultra
5 virus act on their part.

6 Judge, the hand ringing about First Amendment
7 rights is totally misplaced here. And, again, there is
8 nothing that this court has done or that we are asking
9 this court to do, which will, in any way, interfere
10 with the very clear right of any of those defendants to
11 speak as they wish in whatever public forum that they
12 wish. Just don't drag down all of the Legal Aid
13 Societies with you in the name of "free speech."

14 THE COURT: Hold on. I want to ask you a
15 question. This is one question I am going to deal with
16 is the powers of the union. He says the union has the
17 power pursuant to the constitution and bylaws to issue
18 this resolution. What is your response?

19 MR. SMITH: My response is we are not talking
20 about auto workers here who are assembling cars. Every
21 power that this union has is circumscribed by the Rules
22 of Professional Conduct that apply to the vast majority
23 of the members. Not all, but the vast majority of them
24 who are lawyers in New York State and they have got to
25 review what they can and cannot do with the overlay of

1 how what they are proposing to do intersects with the
2 Rules of Professional Conduct. And, in this case, it
3 is absolutely prohibited for them to do this in the
4 first instance and they can't come to this court
5 ringing their hands when they do do it and say, oh, woe
6 is me. We are in this position as a result of
7 membership. Nonsense. Like I said, when the members
8 come in and you tell them that they want you to take a
9 position on Gaza or even being anti-Nazi or even being
10 the most ardent supporter of Netanyahu in the world, we
11 couldn't do it. We can't do it because it interferes
12 with Gideon v. Wainwright and with the Rules of
13 Professional Conduct. They are not auto workers even
14 though they are part of the Auto Workers Union and
15 that, judge, is my ultimate answer to this chimera of
16 issues that they raised. We are not seeking to
17 restrict anyone's free speech. We are seeking to have
18 this court stop them from dragging down all Legal Aid
19 Societies with them and the individual plaintiffs in
20 this case. Thank you, your Honor.

21 THE COURT: Thank you. Would you like to
22 reply?

23 MR. FELSTINER: Yes, your Honor. Thank you.
24 I would start by saying that in addition to
25 each of the defendants and any member having the right

1 to speak, the union as an organization has a right to
2 speak. The union as an organization has a right to put
3 forth its position on issues of public concern. It can
4 speak in opposition to the discrimination on the basis
5 of their politics. It can speak in politics. It can
6 speak in opposition to the policies of United States
7 Government. It would, by no measure, be the first
8 union to speak to the issues. It can speak in
9 opposition to policies of other governments. That is a
10 right that the union enjoys. That is a right that the
11 individual members enjoy, and they can exercise that
12 right through voting as a body.

13 Now, plaintiff's counsel intimated that the,
14 let's say, the permissible scope of action that the
15 union and its officers can take under the bylaws are
16 circumscribed by the Rules of Professional Conduct.
17 They are, essentially, asking you to read the bylaws
18 and anywhere that they allege -- a union action may
19 interfere with the Rules of Professional Conduct, you
20 would then preclude the union from acting. That is not
21 the way that the First Amendment works. So I invite
22 the court to take a look at the bylaws. Nowhere in the
23 bylaws is a resolution of this type prohibited.
24 Nothing in the resolution itself violates the union
25 contract or any of the employee's contractual duties to

Proceedings

45

1 carry out their solemn vote.

2 Plaintiff's counsel stated that it was
3 incumbent upon the individual defendants as
4 representatives of the union to send the members down
5 the block. According to what? The constitution says?
6 We can't do this resolution so I have to send you down
7 the block. Federal law? Nope. Duties of professional
8 responsibility? Nope. That's simply not a duty that
9 this union had or that any of the individuals had. It
10 is a strong preference that the plaintiffs wished.
11 It's not the same thing.

12 THE COURT: All right. Just some
13 housekeeping. Everyone done?

14 MR. FELSTINER: Yes.

15 THE COURT: Plaintiff submitted a reply.
16 Typically, a reply is not permissible on the return
17 date of a TRO. Do you have any objection to the court
18 considering the reply with the understanding you will
19 get to respond to this reply affirmation?

20 MR. FELSTINER: No objection, your Honor.

21 THE COURT: So the court will allow the reply
22 that was submitted 8:40 p.m. last night, November 20.
23 Counsel, how much time do you need to submit a reply?
24 I know the holiday is coming. I will give you until
25 next week.

Proceedings

46

1 MR. FELSTINER: Perhaps Monday, your Honor.

2 THE COURT: I will give you until Tuesday.

3 What date is Tuesday?

4 MR. FELSTINER: Thank you, your Honor.

5 THE COURT: What date is Tuesday?

6 THE CLERK: The 28th.

7 THE COURT: November 28 to submit a response
8 to plaintiff's reply affirmation.

9 MR. FELSTINER: Your Honor, I have another
10 request. To the extent that the declaration of Lisa
11 Ohta was not properly sworn, we request the court's
12 leave to resubmit it in compliance with the CPLR.

13 THE COURT: Any objection?

14 MR. SMITH: Yes, your Honor. That train has
15 left the station. These are lawyers. These are
16 lawyers who know very well what the requirements of
17 2106 are. This court's order was that it could have
18 even been 11:59 last night on November 20 that any
19 responding papers be submitted by then. They can't
20 retroactively cure that by placing a 2106 stamp on
21 what's already been submitted. That default cannot be
22 cured and least of all, with all due respect, should
23 the court consider allowing it to be cured on the part
24 of a lawyer who knows better in the first place.

25 THE COURT: It's my intention to determine

1 this case on the merits. And that would not happen if
2 I was to rule that the defense is now prohibited from
3 filing any additional papers or correcting the error
4 you pointed out. I don't know if it is a fact. I
5 haven't looked at the papers directly, but I am
6 assuming that you are correct that you submit an
7 unsworn documents in support of your application. I
8 will allow you to correct it. The court has inherent
9 authority to do so. I will determine this on the
10 merits and not waste anyone's time because I don't want
11 to have to have a refiling of the action and I will
12 determine this case on the merits.

13 I have a lot of work to do. I will go
14 through every one of these papers of what each of you
15 have submitted, look at the bylaws, the constitution
16 and all the case law, and make the determination.

17 As far as today is concerned, the TRO will
18 continue until such time as a decision is issued by
19 this court. I am going to set a control date 35 days
20 from today. I expect to have my decision within the
21 statutory prescribed 30-day period. So the TRO remains
22 in effect. There shall be no union vote until further
23 order of this court as to its decision.

24 That constitutes the decision and order of
25 this court today. I want to thank both sides. I know

Proceedings

48

1 you have worked extremely hard and diligent on behalf
2 of your clients, and I appreciate the professionalism,
3 and I will do my best to get this right in accordance
4 with the law. So with that, I wish all of you a happy
5 and healthy holiday season, and good day.

6 MR. SMITH: Thank you, your Honor.

7 MR. FELSTINER: Thank you.

8 MR. SMITH: Thank you very much, your Honor.

9 (Proceedings concluded.)

10 * * *

11 I hereby certify the above and foregoing to be a true and
12 accurate record of my stenographic notes.

13 
14 JENNIFER A. SCHMIDT, C.S.R.

15
16
17
18
19
20
21
22
23
24
25

js